United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2049

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATHANIEL WILLIAMS,

Plaintiff-Appellant,

-against-

PETER PREISER, Commissioner of Correction of the State of New York; J. EDWIN LA VALLEE, Superintendent of Clinton Correctional Facility: and DR. F. STANLEY HOFFMEISTER, 1465 Western Avenue, Albany, New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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Preliminary Statement

This is an appeal from an order of the United States District Court for the Northern District of New York (Hon. Edmund Port, U.S.D.J.) dated January 29, 1976 granting summary judgment in favor of the defendants dismissing the complaint on the ground that there were no genuine issues as to any material facts.

Question Presented

Did the District Court properly grant summary judgment to the defendants in an action alleging that the failure of prison officials to provide a prisoner with tenth and eleventh cosmetic reconstructive ear operations states a claim under the federal civil rights act?

Statement of the Case

This civil rights action was commenced by the plaintiff Nathanial Williams, pro se, in 1975 seeking damages from the defendants, Peter Preiser, former Commissioner of the New York State Department of Correctional Services, J. Edwin La Vallee, Superintendent of the Clinton Correctional Facility, and F. Stanley Hoffmeister, a physician employed on a part-time basis by the Department of Correctional Services, for their alleged failure to perform or arrange to have performed upon Mr. Williams two cosmetic plastic surgery procedures in addition to the nine such procedures Mr. Williams had already undergone in the New York State prison system. The defendants moved in the District Court for summary judgment in their favor under Rule 56 of the Federal Rules of Civil Procedure, submitting affidavits from defendant

Hoffmeister and from Assistant Attorney General Timothy F. O'Brien, who was fully familiar with the facts of the case. On January 29, 1976 Judge Port granted the motion on the ground that there were no genuine issues as to any material facts (Appendix G, p. 25a). Apparently plaintiff had submitted his own affidavit in opposition to the motion, but affidavit apparently had not come to the attention of Judge Port prior to rendering his decision.

The events leading to this lawsuit began with an incident which occurred at the Green Haven Correctional Facility, Stormville, New York on September 4, 1969, in which the plaintiff sustained an injury resulting in the loss of a portion of his right external ear. While the cause and circumstances of that injury are in dispute and the subject of litigation (see Williams v. Vincent, 508 F. 2d 541 (2d Cir. 1974), there is no dispute whatever as to the fact that subsequent to that injury New York prison officials provided Mr. Williams with a course of cosmetic reconstructive treatment for his ear involving no less than nine surgical operations.

The dates and nature of those operations are as follows:

November 1970 - right ear construction with cartilage graft

February 1971 - second stage reconstruction and split thickness graft

August 1971 - split thickness graft

December 1971 - revision of superior portion of cartilage graft

June 1972 - thinning of right ear cartilage graft

September 1972 - revision of cartilage graft with excision of hypertrophic scar

January 1973 - correction of deformity of right ear

October 1973 - revision of helical rim and post conchal cartilage graft

February 1974 - thinning of cartilage.

Nor is there any dispute that the treatment was entirely cosmetic in nature with the sole intent of reconstructing the physical appearance of the external ear. The cosmetic surgical treatment was not offered in response to any pain, infection or other illness associated with Mr. Williams' ear, and Mr. Williams' ear was not at any time subject to any such pain, infection, or illness (aside from the normal post-operative discomfort resulting from any surgical procedures). See Complaint, Appendix B, pp. 3a-6a; Hoffmeister Affidavit, Appendix E, pp. 13a-15a.

The complaint does not challenge the skill or propriety of the medical treatment provided to Mr. Williams by prison officials. To the contrary, it asserts merely that in addition to the nine cosmetic ear operations which Mr. Williams received he should also have received tenth and eleventh operations. It is the alleged failure of the defendants to provide Mr. Williams with the tenth and eleventh cosmetic ear operations which constitutes the sole basis for this lawsuit. Plaintiff (through his counsel appointed for this appeal) asserts that the alleged failure by the defendants to provide this treatment constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments which is actionable under the federal civil rights act either 1) on its face or 2) because it was done in an effort to compel Mr. Williams to discontinue other pending litigation against prison officials. (See Plaintiff-Appellant's Brief at 2-3; Complaint, Appendix B, p. 3a).

ARGUMENT

THE FAILURE OF PRISON OFFICIALS TO PROVIDE A PRISONER WITH TENTH AND ELEVENTH COSMETIC RECONSTRUCTIVE EAR OPERATIONS DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT ACTIONABLE UNDER THE FEDERAL CIVIL RIGHTS ACT.

It is well-established that the scope of protection under the federal civil rights act, 42 U.S.C. § 1983, against cruel and unusual punishment proscribed by the Eighth Amendment "is nowhere nearly so extensive as that afforded by the common law tort action for battery ...." Johnson v. Glick, 481 F. 2d 1028, 1033 (2d Cir.), cert den 414 U.S. 1033 (1973); see Rochin v. California, 342 U.S. 165 (1952). "A complaint under Section 1983 based on inadequate medical treatment states a cause of action if it alleges conduct which 'shocks the conscience', such as deliberate indifference by prison authorities to a prisoner's request for essential medical treatment." Williams v. Vincent, supra at 544 (emphasis supplied). "Virtually every ... instance in which a court has granted relief [on a claim of improper medical treatment] has been characterized by a

wilful refusal to treat a known ailment, resulting in considerable pain and injury ...." United States ex rel. Hyde v. McGinnis, 429 F. 2d 864, 867 (2d Cir. 1970) (emphasis supplied).

In Church v. Hegstrom, 416 F. 2d 449 (2d Cir. 1969) this Court delineated the minimum requirements for a civil rights claim for inadequate medical treatment even more clearly. In that case the amended complaint alleged that prison officials had deliberately refused to treat a prisoner for an illness, from which he subsequently died. This Court found that allegation insufficient to state a claim. The Court held that in the absence of a showing of intent to cause physical harm to the prisoner (and no such allegation has been made here), the complaint must allege "the presence of severe and obvious injuries." Church v. Hegstrom, supra, at 451. Without such an injury, no civil rights claim was found to exist. Id., see Martinez v. Mancusi, 443 F. 2d 921, 923 (2d Cir. 1970).

The application of these stringent standards to the facts alleged in the complaint in this case (ignoring for the moment the fact that many of those facts are in dispute) demonstrates that this complaint, even when given a

liberal reading, see Haines v. Kerner, 404 U.S. 519 (1972) does not state a claim under the Civil Rights Act, and the District Court's granting of summary judgment to the defendants was proper and should be affirmed by this Court.

Cosmetic ear surgery cannot be regarded as "essential medical treatment", Williams v. Vincent, supra at 544; Corby v. Conboy, 457 F. 2d 251, 254 (2d Cir. 1972), since the lack of such surgery could result in nothing more for Mr. Williams then the appearance of having a disfigured ear. He could not become ill from the lack of such treatment. He could not die from the lack of such treatment. He could suffer no detrimental physical effect from the lack of such treatment. See Bishop v. Stoneman, 508 F. 2d 1224 (2d Cir. 1974). Thus in no sense was any cosmetic ear surgery essential, let alone tenth and eleventh operations on top of the nine previously administered surgical procedures.

Nor, therefore has Mr. Williams suffered any "severe and obvious injury" from his failure to undergo the tenth and eleventh operations, Church v. Hegstrom, supra at 451. He suffered no injury. He does not allege in his complaint or affidavit that he suffers any pain from the lack

of those two operations, nor that his ear suffers from any ailment which would have been alleviated by the tenth and eleventh operations. Cf. Martinez v. Mancusi, supra.

This Court has never gone so far as to bring claims concerning cosmetic medical treatment within the scope of federal civil rights secured by the United States Constitution, and it should refrain from doing so now. It is difficult to imagine a subject less suited to scrutiny by the federal courts then Mr. Williams' alleged need for tenth and eleventh cosmetic ear operations. If this subject belongs in a judicial forum at all, the proper vehicle for its presentation is a tort action on the New York State Courts.

Since the course of medical treatment received by Mr. Williams is so clearly outside the scope of cruel and unusual punishment prohibited by the Eighth Amendment and actionable under the Civil Rights Act, the motivation for that treatment is irrelevant. It is of no significance whatever why Dr. Hoffmeister decided that nine cosmetic ear operations were enough, since the failure to receive the two additional operations desired by Mr. Williams is not actionable in federal court. Thus Mr. Williams' claim that the reason he did not

receive the two additional operations was to force him to discontinue his pending damage actions in federal court against prison officials cannot save his claim of cruel and unusual punishment. Further, of course, Mr. Williams has not dropped his damage actions, so the effect of such a threat, if there had been such a threat, was nil. Acts without effect do not create a federal civil rights claim.

In his affidavit in this matter, sworn to January 15, 1976 (Appendix F, pp. 18a-21a) plaintiff appears to reveal the true purpose of this lawsuit. In subparagraph (D), Mr. Williams concedes that Dr. Hoffmeister's professional judgment is that no further surgery is required. Mr. Williams, however, does not agree, and would like a federal court to provide Mr. Williams with a second professional opinion as to the propriety of further surgery, and would also like a federal District Judge to examine his ear (Affidavit at sub-par. [F]). Dissatisfaction with Dr. Hoffmeister's professional judgment does not support a federal civil rights claim, since "claims based on differences of opinion over matter of medical judgment fail to rise to level of a § 1983

violation." Corby v. Conboy, supra at 254. Therefore, the District Court properly granted summary judgment to the defendants below, and that order should be affirmed.

CONCLUSION

THE ORDER OF THE DISTRICT COURT GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS SHOULD BE AFFIRMED.

Dated: New York, New York
September 15, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
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Appellees

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

SUSAN D. CHIECO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Defendants-Appellees herein. On the 15th day of September , 1976 , she served the annexed upon the following named person :

JEFFREY I. ZUCKERMAN, ESQ.
48 Wall Street
New York, New York 10005

Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Susan D. Chieco

Sworn to before me this
15th day of September , 1976

Assistant Attorney General
of the State of New York